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No. 297

# In the Supreme Court of the United States

OCTOBER TERM, 1961

LUTHER F. GRANT AND SIRKKA V. GRANT, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Appeals (Pet. 28–32) is reported at 291 F. 2d 227. The oral findings and opinion of the District Court (R. 222–228) are not officially reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 19, 1961 (Pet. 33). The petition for a writ of certiorari was filed on August 10, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether, under the facts presented on this record, the rights of the petitioners under the Fourth or Fifth

Amendments of the United States Constitution were violated by the conduct of the investigating agents of the Internal Revenue Service.

## STATEMENT

This proceeding arises on petitioners' motion under Rule 41(e) of the Federal Rules of Criminal Procedure, filed and decided before indictment,[1] for the return and suppression as evidence of certain papers and records obtained by a special agent of the Internal Revenue Service in the course of an investigation. At the close of the petitioners' case, the District Court dismissed the motion, orally finding that (R. 226–227):[2]

> * * * these books and records were freely and voluntarily turned over without any fraud or deceit, and that the testimony that was presented here in support of the petitioners' allegations in the petition did not convince me at all that such action of fraud and deceit was made by the Government agents, Internal Revenue or Special, under all the circumstances disclosed by the witnesses.

The Court of Appeals affirmed. (Pet. 28–32.) Petitioners' evidence at the hearing disclosed the following:

An investigation and audit of petitioners' joint income tax return for the year 1953, later expanded to include 1952 and 1954, was begun in May 1955. It

[1] No indictment was returned until December 8, 1960, two days after the District Court had dismissed the motion to suppress.

[2] "R." refers to the transcript of the hearing in the District Court.

was conducted at first solely by Internal Revenue Agents under the jurisdiction of the Audit Division of the Internal Revenue Service (agents Solomon and, after his resignation, Aiello). (R. 19, 30–31, 97, 102.) On January 30, 1957, Special Agent Howland of the Intelligence Division entered the case to determine whether fraud was involved. Thereafter the investigation was joint, the Audit Division and the Intelligence Division cooperating under the direction of the Intelligence Divison.

Howland was introduced to Dr. Grant as a "special agent" (R. 108)[3] and told him at the outset of his investigation that "You don't have to give me this information but we can get it anyway." (R. 154–155.) Dr. Grant instructed his secretary to cooperate with Howland and to give him whatever information he wanted. (R. 109–110.) At Dr. Grants' direction, his log books and cancelled checks for the years 1952–1954 were turned over to Howland on September 16, 1958; they were returned on November 19, 1958. (R. 171, 172.) Mrs. Grant's cancelled checks for the same years were turned over to Howland on January 15, 1959. (R. 174, 175.)

By letter of June 3, 1959, Dr. Grant was advised that criminal proceedings against him were being considered. He testified that this development was a surprise and shock to him. It was the doctor's general policy to comply with the requests of the investigating agents, and, when asked for records, he would tell them

[3] Howland similarly identified himself as a "Special Agent, Intelligence Division" in signing a receipt for books and records turned over to him (on September 16, 1958) and a letter to Dr. Grant (on April 13, 1959).

that he would get the records together and have them available at a later date. (R. 173.) He also testified that the records had been turned over under the impression that it was his duty to do so. (R. 177–180.) Dr. Grant admitted that before he allowed the special agent to take his books he might have been informed by his accountant that the entry of the special agent into the case indicated that there was a possibility of his being put in jail. (R. 163, 171, 172.)

**ARGUMENT**

1. There is no occasion for review by this Court at this stage of the proceedings. Whether or not the dismissal of the motion to suppress was technically a "final" order for purposes of appeal,[4] it does not in fact finally dispose of the issues between the parties, since the same questions may be raised by objections to the evidence at the trial of the criminal case. Should the evidence be admitted in the criminal case and result in a conviction, and that conviction be affirmed, it will then be time enough to consider, in the light of whatever additional facts are brought out at the trial, whether the question warrants review by this Court.

2. Petitioners' contentions are in any event without merit. They contend, in effect, that the information given to Special Agent Howland was not voluntarily

[4] The Second Circuit holds that the order is appealable if, as here, the motion was filed before indictment (*e.g.*, *United States* v. *Poller*, 43 F. 2d 911, 912; *Lapides* v. *United States*, 215 F. 2d 253, 254), but that question is now pending before this Court in *DiBella* v. *United States*, No. 21. For the position of the United States on the issue of appealability, see the government's brief in No. 21, Point I.

or freely disclosed because it was requested under the guise of a routine examination for civil purposes, which would not give the taxpayer any warning of a possible criminal prosecution. Both courts below, however, have found that the disclosures were freely made without fraud, duress, or coercion, and those concurrent findings present no issue appropriate for review here.

The petitioners' claim to a constitutional right to an explicit warning of a possible criminal prosecution in the circumstances of this case is not supported by any decisions. On the contrary, the settled rule is that failure to warn a potential defendant of his privilege against self-incrimination does not render inadmissible otherwise voluntary admissions. *Powers* v. *United States,* 223 U.S. 303; *Wilson* v. *United States,* 162 U.S. 613; *United States* v. *Sclafani,* 265 F. 2d 408 (C.A. 2d), certiorari denied, *Turner* v. *United States,* 222 F. 2d 926 (C.A. 4th), certiorari denied, 350 U.S. 831; 360 U.S. 918; *Montgomery* v. *United States,* 203 F. 2d 887, 892–893 (C.A. 5th); *Hanson* v. *United States,* 186 F. 2d 61, 64–66 (C.A. 8th); *Lisansky* v. *United States,* 31 F. 2d 846, 851 (C.A. 4th), certiorari denied, 279 U.S. 873; *Scanlon* v. *United States,* 223 F. 2d 382, 385 (C.A. 1st).

Moreover, sufficient warning of a possible criminal prosecution was here present. The agents made no attempt to hide their official identity or the official purpose of their business. The petitioners were bound to be aware that if a "routine audit" of their tax liabilities revealed evidence of criminal liability, the agents would not ignore it merely because they were

primarily concerned with civil liability. *United States* v. *Sclafani*, *supra*, pp. 414–415.[5] Indeed, as the court below pointed out, the petitioners' claim of possible ignorance of their rights was "highly doubtful". (Pet. 31.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[5] In *Sclafani*, the Second Circuit expressly disapproved the distinction between routine audits and special agent investigations made in *United States* v. *Wolrich*, 129 F. Supp. 528 (S.D. N.Y.), upon which the petitioners rely. (Pet. 15.)